Razman bin Hashim v South East Asia Insurance Co

HIGH COURT (IPOH) — CIVIL APPEAL NO 12-1-1993
KANG HWEE GEE JC
1 APRIL 1995

Tort *— Negligence — Contributory negligence — Rider of motor cycle not a party to the suit — Whether liability could be apportioned — Whether several liability — Whether plaintiff pillion rider could be contributorily negligent — Civil Law Act 1956 s 10(2)*

Civil Procedure *— Parties — Non-joinder of party — Joint tortfeasors — One of them not party to suit — Not called as witness — Apportionment of liability — Whether order consistent with legal principles — Whether rule of natural justice breached*

Insurance *— Motor insurance — Liability of insurers to satisfy judgment obtained against insured — Insured a joint tortfeasor — The other joint tortfeasor not a party to the suit — Whether insurer must pay full judgment sum — Road Traffic Ordinance 1958 s 80(1) — Road Transport Act 1987 s 96*

In a road accident, a motor cycle collided with a motor car. The rider of the motorcycle ('the deceased rider') died, and the pillion rider ('the appellant') was injured. The appellant sued the driver of the motor car ('the driver') in the High Court, and the driver was ordered to pay RM60,000 to the appellant as general damages. However, although the estate of the deceased rider was not a party to the suit, the High Court also held that the driver and the deceased rider were joint tortfeasors, and apportioned their liability on a 50:50 basis. Purporting to act under the order, the insurer of the motor car ('the respondent'), paid the appellant 50% of the judgment sum, which they contended was the only sum they were obliged to pay under s 80(1) of the Road Traffic Ordinance 1958 ('the Ordinance'), in view of the apportionment of liability. Dissatisfied, the appellant filed an action against the respondent in the sessions court to recover the balance 50% of the judgment sum. The sessions court judge dismissed the action and the appellant has appealed.

Held, allowing the appeal:

(1) As the appellant had only sued the driver, the High Court should not have apportioned liability because this gave rise to a problem in interpretation. However, the judgment did not order the driver to be liable for only 50% of the damages. Therefore, to give effect to the judgment, it was necessary to apply the purposive approach of interpretation, ie to attribute to the judge an intention to act in conformity with legal principles and not contrary to them.

(2) The part of the order of the High Court which required the driver to pay the full judgment sum to the appellant was explicit enough to be enforced. It was consistent with the established principle that a pillion rider on a motor cycle could not be found to be contributorily negligent. It is also consistent with the principle

that joint tortfeasors are severally liable to the plaintiff who is entitled to recover his whole loss from whichever tortfeasors he chooses.

(3) However, the other part which purported to apportion liability between the driver and the deceased was incongruous and should be ignored. The High Court was in no position to order the deceased to contribute 50% of the liability to the appellant under s 10(2) of the Civil Law Act 1956, as the estate of the deceased was not a party to the suit. It was clear that the liability to pay the judgment sum was a 'liability covered by the term of the policy' under s 80(1) of the Ordinance, and fell on the respondent alone.

(4) The order apportioning the liability was also in clear breach of the *audi alteram partem* maxim under the principle of natural justice, as the High Court in the present case had not heard the deceased who could not be called as a witness.

[Bahasa Malaysia summary

Di dalam suatu kemalangan jalan raya, sebuah motosikal telah berlanggar dengan sebuah motokar. Penunggang motosikal itu ('si mati') telah meninggal dunia dan pembonceng motosikal itu ('perayu') pula mengalami kecederaan. Perayu telah mendakwa pemandu motokar itu ('pemandu motokar') di Mahkamah Tinggi, dan pemandu motokar itu telah diperintahkan supaya membayar RM60,000 kepada perayu sebagai ganti rugi am. Walau bagaimanapun, sungguhpun harta pusaka si mati tidak merupakan suatu pihak di dalam guaman ini, Mahkamah Tinggi juga memutuskan bahawa pemandu motokar tersebut dan si mati merupakan pelaku tort bersama, lalu mengumpukan liabiliti mereka pada kadar 50:50. Syarikat insurans motokar tersebut ('responden') telah membayar perayu 50% daripada jumlah penghakiman tersebut kononnya dengan tujuan memuaskan perintah mahkamah. Mereka mengatakan bahawa jumlah tersebut merupakan jumlah tunggal yang wajib dibayar oleh mereka di bawah Ordinan Trafik Jalan 1958 ('Ordinan tersebut'), memandangkan pengumpukan liabiliti itu. Perayu tidak berpuas hati, lalu memfailkan suatu tindakan terhadap responden di mahkamah sesyen untuk mendapat kembali baki 50% daripada jumlah penghakiman. Tindakannya telah ditolak oleh hakim mahkamah sesyen dan perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Oleh kerana perayu hanya mendakwa pemandu motokar itu, Mahkamah Tinggi tidak seharusnya mengumpukan liabiliti kerana ini telah menimbulkan masalah pentafsiran. Bagaimanapun, penghakiman itu tidak memerintahkan pemandu motokar itu menanggung hanya 50% daripada ganti rugi. Oleh itu, untuk menguatkuasakan penghakiman tersebut, adalah perlu untuk mentafsirnya dengan menggunakan pendekatan purposif, iaitu

adalah perlu untuk menganggap bahawa hakim yang berkenaan berniat untuk bertindak menurut prinsip undang-undang, dan bukan bercanggahan dengannya.

(2) Bahagian penghakiman Mahkamah Tinggi yang memerintahkan supaya pemandu motokar tersebut membayar jumlah penghakiman yang sepenuhnya adalah jelas dan harus dikuatkuasakan. Ia adalah sejajar dengan prinsip mantap bahawa pembonceng motosikal tidak boleh didapati melakukan kecuaian sertaan. Ia juga adalah selaras dengan prinsip bahawa pelaku tort bersama adalah bertanggungan secara berasingan terhadap plaintif yang berhak mendapatkan keseluruhan kerugiannya daripada mana-mana pelaku tort yang beliau pilih.

(3) Walau bagaimanapun, bahagian penghakiman yang lain yang dikatakan bermaksud untuk mengumpukan liabiliti antara pemandu motokar dengan si mati adalah tidak kena, dan harus diabaikan. Oleh kerana harta pusaka si mati bukan merupakan suatu pihak di dalam guaman ini, Mahkamah Tinggi tidak boleh memerintah supaya si mati menanggung 50% daripada liabiliti perayu di bawah s 10(2) Akta Undang-Undang Sivil 1956. Adalah jelas bahawa liabiliti untuk membayar jumlah penghakiman itu yang merupakan suatu 'liabiliti yang dirangkumi oleh terma polisi' di bawah s 80(1) Ordinan tersebut, jatuh ke atas responden sahaja.

(4) Juga, adalah jelas bahawa perintah pengumpukan liabiliti itu melanggar maxim *audi alteram partem* di bawah prinsip keadilan asasi, kerana Mahkamah Tinggi di dalam kes ini tidak mendengar keterangan daripada si mati yang sudah tidak boleh dipanggil sebagai seorang saksi.]

Notes

For cases on road accidents due to negligence, see 12 *Mallal's Digest* (4th Ed) paras 392–572; [1989] Mallal's Digest 1501, 1506, 1510; [1990] Mallal's Digest 1183,1192, 1194; [1991] Mallal's Digest 1964; [1992] Mallal's Digest 1656–1662; [1993] Mallal's Digest 1291–1292.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed) paras 283–298; [1989] Mallal's Digest 1509; [1991] Mallal's Digest 1932; [1992] Mallal's Digest 1650.

For a case on joint tortfeasors, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2434.

For cases on non-joinder of parties, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2450–2451.

For cases on liability of insurers to satisfy judgment obtained against the insured, see 11 *Mallal's Digest* (4th Ed) paras 148–149.

Cases referred to

Md Jailani bin Ta'at v Zoolkiplie bin Hj Abdul Rahman & Anor [1990] 2 CLJ 256 (folld)

Sundram v Arujunnan & Anor [1994] 3 MLJ 361 (folld)
Tan Chik bin Ibrahim v Safety Life and General Insurance Sdn Bhd [1986] 2 CLJ 428 (distd)
VD Sujatha v G Prabhakaran Nair [1988] 3 MLJ 259 (folld)

Legislation referred to

Civil Law Act 1956 s 10(2)
Road Traffic Ordinance 1958 s 80(1)
Road Transport Act 1987 s 96

Sarjeet Singh (*Sandu & Co*) for the appellant.
VT Singam (*VT Singam & Co*) for the respondent.

Kang Hwee Gee JC: This is an appeal from the decision of the Sessions Court, Sitiawan dismissing the appellant's claim under s 80(1) of the Road Traffic Ordinance 1958 ('the Ordinance') for the sum of RM39,877.38, being the balance sum of an award inclusive of interest and costs made against the respondent insurance company in favour of the appellant in High Court Civil Suit No 984/85.

In that suit, the appellant was a pillion rider of a motor cycle when it collided with a motor car driven by one Zamali bin Hj Abdul Rahman. The rider of the motor cycle died as a result of the accident. The appellant sued the driver of the motor car, but did not sue the estate of the deceased motor cyclist. The insurer of the said motor car was South East Asia Insurance Bhd, the respondent in this appeal. The appellant obtained judgment against the driver of the motor car, which was worded in the following form:

> This matter coming up for hearing this day in the presence of Mr Harbans Singh, counsel for the plaintiff, and Mr Manjeet Singh Dhillon, counsel for the defendant, and upon hearing evidence of the parties and counsel aforesaid.
>
> It is hereby adjudged that the defendant do pay the plaintiff the sum of Ringgit Malaysia sixty thousand only (RM60,000), as general damages for pain and suffering and loss of amenities, with interest thereon at 8% from date of service of writ to date of judgment.
>
> And it is ordered that the defendant do pay the plaintiff costs of this suit.
>
> And it is also ordered that liability between the defendant and the deceased rider of the motor cycle No BAG 7187 be apportioned on a 50:50 basis.

On appeal, the Supreme Court reduced the amount awarded to RM45,000, but did not disturb the order of the High Court with respect to the apportionment of liability between the defendant and the deceased rider, which therefore remained at 50:50.

A salient point to note in the order of the High Court is that, although the estate of the deceased rider was not a party to the suit, liability between the driver of the motor car and the deceased rider was apportioned on a 50:50 basis. Purporting to act under the order, the

respondent as insurer of the motor car, paid the appellant the sum of RM22,500, being 50% of the sum of RM45,000 for general damages, which they contend was the only sum they were obliged to pay in view of the apportionment of liability.

Consequently, the appellant filed an action for recovery of the balance of the judgment sum against the respondent insurer, under s 80 of the Ordinance (now s 96 of the Road Transport Act 1987) at the sessions court. For ease of reference, s 80(1) of the Ordinance is reproduced as follows:

> If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Before me, counsel for the respondent contends that the sessions court was right in dismissing the appellant's claim, as by reason of the apportionment, the insurer was liable to meet the appellant's claim under s 80(1) of the Ordinance only to the extent of 50% of the sum of RM45,000. The thrust of the respondent counsel's argument is that the respondent, as insurer of the motor car, was only liable under the said section to satisfy the judgment which the High Court ruled the insured was liable for, in accordance with the decision in *Tan Chik bin Ibrahim v Safety Life and General Insurance Sdn Bhd* [1986] 2 CLJ 428.

Tan Chik's case involved a collision between a motor scooter carrying a pillion and a motor lorry. The motor lorry was insured by the respondent company, and the motor scooter by another. The pillion rider of the motor scooter sued both the rider of the motor scooter and the driver (as well as the owner) of the motor lorry, which were involved in the accident in which he was injured. The High Court found the rider of the motor scooter and the driver of the motor lorry equally to be blamed for the accident. The plaintiff then sought to enforce the whole judgment sum only against the respondent insurer, under s 80(1) of the Ordinance. The High Court held that the insurer was liable to pay only that part of the judgment which the driver and the owner of the motor lorry were liable for, ie only half of the sum awarded.

The decision was confirmed by the Supreme Court on appeal. The Supreme Court found that both the driver and the rider were in fact joint tortfeasors, and the High Court had apportioned both the liability as well as damages to be paid by the parties, presumably acting under s 10(2) of the Civil Law Act 1956. For the purpose of a claim under s 80(1) of the Ordinance however, it was held that an insurer's liability would be limited

only to 'any sums payable thereunder in respect of the liability', and in any case, only in respect of 'liability covered by the terms of the policy', as stated in the section. The 'sums payable thereunder' means, as far as the respondent insurer was concerned, the apportioned 50% liability as found by the court. The 'liability covered by the terms of the policy' means the liability in respect of insurance cover for the motor lorry, and excludes the liability in respect of cover for the motor cycle, for which the respondent insurer was never under risk. It was held therefore, that the appellant could only recover against the insurer that part of the judgment sum awarded against the driver of the motor lorry, and [the insurer] could not be made liable for that part of the judgment awarded against the rider of the motor cycle.

In his submission, counsel for the respondent sought to convince me that in the context of the present case, the term 'any sums payable thereunder in respect of the liability' in s 80(1) refers to the apportioned liability between the appellant and the deceased driver, ie 50% of the RM60,000 awarded which was later reduced by the Supreme Court to RM45,000. As the sum of RM22,500 had already been disbursed, the appellant should have no further claim against the respondent.

With respect, I am unable to agree. *Tan Chik*'s case could be distinguished on the facts from the present case, in so far as it orders the rider of the motor scooter to contribute 50% of the sum awarded was concerned. In the present case, the appellant pillion rider only sued the respondent driver of the car. The rider of the motor cycle (by his estate) was not a party to the suit. Consequently, the trial court would not be in a position to order (and in fact did not so order) the rider to contribute 50% of the liability to the appellant plaintiff under s 10(2) of the Civil Law Act 1956, as was done in *Tan Chik*.

As the deceased motor cyclist by his estate was not a party to the suit in the present case, clearly the liability to pay 'any sum payable thereunder in respect of the liability' under s 80(1), ie the sum of RM60,000 (reduced to RM45,000 by the Supreme Court), must fall squarely on the shoulders of the respondent insurer alone, being clearly a 'liability covered by the term of the insurance' as the insurer of the motor car.

Undoubtedly, the order of the High Court in the present case appears to be somewhat incongruous to the extent that an apportionment of liability was made in respect of the deceased motor cyclist who was never a party in the suit, thereby giving rise to problems in interpretation. But the judgment did not go so far as to order that the driver of the car was liable for only 50% of the assessed general damages to the appellant. On the contrary, it was explicit enough to order that:

> The defendant do pay the plaintiff the sum of Ringgit Malaysia sixty thousand only (RM60,000).

To give effect to the judgment under the circumstances, it may be necessary to apply the purposive approach of interpretation enunciated by Chan Sek Keong J in the Singapore case of *VD Sujatha v G Prabhakaran Nair* [1988] 3 MLJ 259 that:

> ... where an order of court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them ...

The order to the defendant to pay the full sum to the plaintiff, it would appear, is absolutely consistent with the established principle that a pillion rider, who is merely a passive passenger on the motor cycle, is always faultless and therefore could not be found to be contributorily negligent (see *Md Jailani bin Ta'at v Zoolkiplie bin Hj Abdul Rahman & Anor* [1990] 2 CLJ 256). It is also consistent with the principle that a joint tortfeasor (in the present case the driver and the rider) are severally liable, irrespective of the degree of his blameworthiness, to the plaintiff who remains entitled to recover his whole loss from whichever defendant he chooses. (See *Winfield and Jolowicz on Tort* (11th Ed) at p 581.)

On the other hand, the order apportioning the liability appears to be in clear breach of the principle of natural justice. A close parallel may be drawn with the Supreme Court case of *Sundram v Arujunnan & Anor* [1994] 3 MLJ 361, where it was held that it was neither right nor fair for the trial court to conclude that the plaintiff's head injury had been caused by the prior collision involving the plaintiff's motor cycle and another motor cycle, without hearing the rider of that motor cycle who was not a party to the suit or called as a witness. Such a finding it was held, was in breach of the *audi alteram partem* maxim.

The judgment of the High Court Civil Suit No 984/85 in the present case, in my view, was clear enough in so far as it ordered the defendant driver to pay the sum awarded to the pillion plaintiff, and should therefore be enforced. In so far as the other part of the order purporting to apportion liability between the deceased motor cyclist and the driver of the motor car, this could be safely ignored by applying the purposive approach to interpretation.

It would appear that the learned sessions judge in dismissing the appellant's claim chose to ignore that part of the judgment that clearly ordered the defendant to pay the judgment sum to the appellant. He based his decision only on that part of the judgment which apportioned the liability between the driver of the car and the rider of the motor cycle 50:50, without taking into consideration that the rider of the motor cycle was not a party in the suit, and consequently (for the reasons already stated), could not be made to contribute the judgment sum to the appellant. His finding was clearly untenable. Accordingly, I would allow this appeal with costs.

Appeal allowed.

Reported by Isabel Liong